

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
	:	
<b>FRANK AND ERIN KELLY</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 818286</b>
for Redetermination of Deficiencies or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law for the Years 1995 and 1996.	:	

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Petitioners, Frank and Erin Kelly, 21 Croyden Drive, Massapequa, New York 11758, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1995 and 1996.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 175 Fulton Avenue, Hempstead, New York on May 8, 2002 at 10:30 A.M. Petitioners appeared by John T. Roesch, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Fred Havenbrook).

Since neither party herein elected to reserve time to file briefs, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

***ISSUE***

Whether petitioners have adduced sufficient evidence to adequately substantiate all or a portion of the miscellaneous itemized deductions claimed on their 1995 and 1996 income tax returns for unreimbursed employee business expenses allegedly incurred by petitioner Erin Kelly.

***FINDINGS OF FACT***

1. Petitioners herein, Frank and Erin Kelly, filed a timely New York State resident income tax return for 1995 reporting thereon New York adjusted gross income of \$95,836.00 and subtracting therefrom New York itemized deductions of \$25,350.00. Petitioners also filed a timely New York State resident income tax return for the 1996 tax year reporting New York adjusted gross income of \$76,172.00 and New York itemized deductions of \$24,583.00.

2. The Division of Taxation (“Division”) conducted an audit of petitioners’ 1995 and 1996 income tax returns requesting that they submit documentation to support the itemized deductions claimed on each return. Petitioners complied with the Division’s request, and after reviewing the documentation submitted, the Division determined that petitioners had adequately substantiated only a portion of the itemized deductions claimed on their 1995 and 1996 income tax returns. The following table sets forth the amounts claimed, allowed and disallowed:

<b><u>1995</u></b>			
<u>Deduction</u>	<u>Claimed</u>	<u>Allowed</u>	<u>Disallowed</u>
Taxes	\$12,505.00	\$ 8,315.00	\$4,190.00
Interest	12,739.00	12,739.00	-0-
Contributions	1,845.00	-0-	1,845.00
Miscellaneous Deductions	<u>3,477.00</u>	<u>-0-</u>	<u>3,477.00</u>
Subtotal	\$30,566.00	\$21,054.00	<u>\$9,512.00</u>
Less: State & Local Income Taxes	<u>5,216.00</u>	<u>5,216.00</u>	
Total	<u>\$25,350.00</u>	<u>\$15,838.00</u>	

**1996**

<u>Deduction</u>	<u>Claimed</u>	<u>Allowed</u>	<u>Disallowed</u>
Taxes	\$10,644.00	\$ 7,044.00	\$3,600.00
Interest	13,672.00	13,672.00	-0-
Contributions	1,891.00	-0-	1,891.00
Miscellaneous Deductions	<u>2,334.00</u>	<u>-0-</u>	<u>2,334.00</u>
Subtotal	\$26,197.00	\$18,134.00	\$7,825.00
Less: State & Local Income Taxes	<u>3,958.00</u>	<u>3,958.00</u>	
Total	<u>\$24,583.00</u>	<u>\$16,758.00</u>	

3. On September 4, 1998, the Division issued two notices of deficiency to petitioners, one for each year at issue. The Notice of Deficiency for the 1995 tax year disallowed \$9,512.00 of claimed itemized deductions (\$25,350.00 claimed less \$15,838.00 allowed). This adjustment increased reported taxable income by \$9,512.00 and resulted in additional New York State personal income tax due of \$722.32. The Notice of Deficiency for the 1996 tax year disallowed \$7,825.00 of claimed itemized deductions (\$24,583.00 claimed less \$16,758.00 allowed), which adjustment produced additional tax due of \$560.00. In addition to the tax due, each notice of deficiency also asserted that interest and negligence penalty were due.

4. Petitioners concede the adjustments made by the Division to taxes and contributions and therefore these items will be not addressed hereinafter. The only issue left in dispute in this proceeding is whether petitioners have adduced sufficient evidence to adequately substantiate the miscellaneous itemized deductions claimed on their 1995 and 1996 income tax returns.

Petitioners maintain that Erin Kelly used her personal automobile for her employment a total of 14,817 miles in 1995 and 15,018 miles in 1996 and that she was not reimbursed for these expenses. Mrs. Kelly also claims that she incurred unreimbursed telephone charges of \$199.75 in 1995 and \$203.00 in 1996.

5. For both years at issue herein petitioner Erin Kelly was employed by Leonard B. Symons, Attorney at Law. For the 1995 tax year Mrs. Kelly reported wage income of \$26,348.56 and for 1996 her wages totaled \$19,254.84. By letter dated January 4, 1999 Mr. Symons advised petitioners' representative as follows:

Pleased be advised that pursuant to the terms of Mrs. Kelly's employment with this office, she is required to travel between my West Babylon and Mineola offices. Mrs. Kelly also travels to the various courthouses in both Nassau and Suffolk Counties. In addition to her using her own personal vehicle, any and all expenses associated with this travel requirement are borne solely by Mrs. Kelly.

6. To substantiate the claimed mileage and telephone expenses, petitioners submitted a monthly calendar for each of the 24 months at issue in this proceeding. The monthly calendars contained entries on each Monday through Friday work day. For almost every Monday through Friday work day the entry made on the monthly calendar was "Babylon - Mineola - Babylon 46 miles; check-in \$.75." It is undisputed that the monthly calendars submitted in evidence were not contemporaneously kept documents but instead represent a reconstruction or summary purportedly prepared by Mrs. Kelly from some other source or documents the nature of which was not disclosed in the record. Neither petitioner appeared at the hearing held herein to give their testimony and no excuse was offered for their failure to appear. Petitioners did not submit affidavits in evidence.

7. Examination of the monthly calendars offered in evidence reveals that for 1995 there was a total of 260 Monday through Friday work days and that Mrs. Kelly did not work on 21 of these days, thus leaving 239 days worked. The monthly calendars claim that Mrs. Kelly traveled between the two offices on 237 of the 239 days worked. For the 1996 tax year there was a total of 262 Monday through Friday work days and Mrs. Kelly was off on 23 on these days, thereby

producing a total of 239 work days. The monthly calendars for 1996 assert that Mrs. Kelly traveled between the two offices on 235 of the 239 days worked.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 689(e) places the burden of proof on petitioners to show that the notices of deficiency issued by the Division are erroneous. In the instant matter petitioners have failed to meet their burden of proof. Initially, I note that petitioners did not appear at the hearing to testify nor were any affidavits presented in lieu of their testimony. Thus, the record is essentially devoid of any of the details regarding Mrs. Kelly's employment. Furthermore, the January 4, 1999 letter from Mrs. Kelly's employer fails to specifically state that the travel requirements of her employment existed during the years 1995 and 1996.

Also, the monthly calendars submitted in evidence were not contemporaneous documents and the record fails to establish who prepared the calendars and the source of the information which was transcribed to the calendars. The reliability of the monthly calendars is also brought into question when it is considered that for both years said calendars report that Mrs. Kelly worked a total of 239 days each year. For 1995 Mrs. Kelly received wages of \$26,348.56; however, for 1996 her wages totaled \$19,254.84, a decrease of 27%. At this income level it is hard to accept that an individual would work the same number of days in 1996 for 27% less pay than received the previous year. Absent some plausible explanation, it seems more likely that the reconstructed monthly calendars do not reflect an accurate portrayal of Mrs. Kelly's employment activities.

Finally, it is noted that petitioners overstated their claimed deductions for real estate taxes and did not provide any documents to support claimed contributions. Thus, petitioners have

established a less than sterling compliance pattern which is a factor to consider when weighing the borderline evidence adduced to support claimed miscellaneous expenses.

B. The petition of Frank and Erin Kelly is denied and the two notices of deficiency dated September 4, 1998 are sustained.

DATED: Troy, New York  
July 3, 2002

/s/ James Hoefer  
PRESIDING OFFICER